

# Exhibit 39



Public Submission of the  
Defense of Freedom Institute for Policy Studies on the  
U.S. Department of Education's Notice of Proposed Rulemaking  
*Nondiscrimination on the Basis of Sex in Education Programs or  
Activities Receiving Federal Financial Assistance*  
Agency/Docket Number: ED-2021-OCR-0166  
RIN: 1870-AA16  
Document Number: 2022-13734



discrimination based on gender identity and sexual orientation will have broad impacts on family well-being, the Department must assess its proposed rule in light of the seven factors listed in the law in order to avoid acting in an arbitrary and capricious manner. Any failure to do so would be arbitrary and capricious and a violation of the APA.

### **The slippery slope of gender identity affirmations by teachers and recipient employees**

Despite the lack of statutory authority under Title IX, the NPRM would require teacher, Title IX Coordinator, or recipient employee communications with students regarding gender-affirming care. The NPRM goes to extraordinary lengths to insert a student’s “inner sense of gender” into Title IX’s protections and the Department’s (and recipients’) peculiar set of interests and newfound enforcement authorities. As discussed *supra*, elementary and secondary school employees would be obligated to monitor for and report any possible violation, objectively *and* subjectively considered, of a student’s Title IX rights—now to include gender identity (and sexual orientation, sex stereotypes, and sex characteristics). The Department’s proposed grant of parental authority, quite possibly to a recipient employee, such as a teacher, acting *in loco parentis* on behalf of a student, discussed *supra*, presents further concern regarding recipient advocacy of gender-affirming care for a student whose “inner sense of gender” seemed to the recipient employee (acting *in loco parentis*) to warrant the care. Recipient employees, including the Title IX Coordinator, may genuinely come to believe—having considered a young student’s apparent “inner sense of gender”—that psychological or even physiological treatment is warranted. The NPRM includes no prohibition on such considerations by recipient employees, even as it assumes many parental roles regarding the student’s developmental attributes.

Admiral Rachel Levine,<sup>392</sup> the biologically male Assistant Secretary of Health at the U.S. Department of Health and Human Services (“HHS”) who identifies as a woman, maintains an official biography that emphasizes a focus “on the intersection between mental and physical health, treating children, adolescents, and young adults.”<sup>393</sup> Admiral Levine has long expressly advocated the provision of puberty blockers, cross-sex hormones, mastectomies, and castrations for sex reassignment “transitions” for youth.<sup>394</sup> Of particular note, during the Admiral’s confirmation hearings, Levine refused to answer whether “minors are capable of making such a life-changing decision as changing one’s sex” and whether the government should be permitted to “override the

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<sup>392</sup> See <https://www.hhs.gov/about/leadership/rachel-levine.html>.

<sup>393</sup> *Id.*

<sup>394</sup> See Rachel Levine, Address at Franklin & Marshall College, “It’s a Transgeneration: Issues in Transgender Medicine” (Jan. 19, 2017), available at <https://www.fandm.edu/common-hour/common-hour-archive/2017/01/30/it-s-a-transgeneration-issues-in-transgender-medicine>.



parent's consent [in order] to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia.”<sup>395</sup>

HHS recently issued guidance, “Gender-Affirming Care and Young People,” that states that “[g]ender-affirming care is a supportive form of healthcare” and “may include medical, surgical, mental health, and non-medical services for trans gender and nonbinary people.”<sup>396</sup> It advocates that *“early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent to focus on social transitions and can increase their confidence . . .”*<sup>397</sup> HHS includes elementary and secondary school students as part of the intended audience for this guidance.

In the absence of contrary directives in the NPRM, the public is right to assume that the Department follows the directives of President Biden’s public health experts at HHS, led by Admiral Levine, who believe and have publicly stated that children and adolescents should receive “gender-affirming care” at the earliest possible point in life.<sup>398</sup> The Department has arbitrarily and capriciously failed to explain in the NPRM whether the NPRM requires or authorizes school district employees and other recipients to override parental refusal to provide “gender-affirming care” for their children.

Other administration officials have parroted Admiral Levine’s approach. On March 31, 2022 (the “Transgender Day of Visibility”), U.S. Secretary of State Antony Blinken equated the denial of gender-affirming care with “violence.”<sup>399</sup> With slightly less subtlety, on the same date, HHS declared that “[t]ransgender and gender nonbinary adolescents are at increased risk for mental health issues, substance abuse, and suicide.”<sup>400</sup> On April 7, 2022, White House Press Secretary Jen Psaki called gender-affirming care “medically necessary, lifesaving healthcare for [kids].”<sup>401</sup> Secretary Cardona, in announcing the NPRM, blamed the absence of additional Title IX protections based on gender identity (and sexual orientation, sex stereotypes, sex characteristics,

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<sup>395</sup> Madeleine Kearns, *The Absurd Criticism of Rand Paul’s Rachel Levine Questioning*, NAT'L REV., Feb. 26, 2021, [https://www.nationalreview.com/2021/02/the-absurd-criticism-of-rand-pauls-rachel-levine-questioning/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oewgUsxWiD8lk5iSpuLpRFefGRxsoc3QtYyuI7ZOhdWjMlxY3Xn-ZRoC-wsQAvD\\_BwE](https://www.nationalreview.com/2021/02/the-absurd-criticism-of-rand-pauls-rachel-levine-questioning/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oewgUsxWiD8lk5iSpuLpRFefGRxsoc3QtYyuI7ZOhdWjMlxY3Xn-ZRoC-wsQAvD_BwE).

<sup>396</sup> See <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> See <https://www.state.gov/on-transgender-day-of-visibility-2/>.

<sup>400</sup> See <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

<sup>401</sup> See <https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/07/press-briefing-by-press-secretary-jen-psaki-april-7-2022/>.



and pregnancy or related conditions) on “higher rates of anxiety, depression, and suicide” among “LGBTQ youth.”<sup>402</sup>

The Biden administration’s enthusiasm for gender reassignment surgery is at odds with the findings of the Obama administration’s Centers for Medicare and Medicaid Services, which, in 2016, determined that the surgery would not be covered<sup>403</sup> by plans because of insufficient evidence (“evidence gaps”) that it benefits patients.<sup>404</sup> In contrast, the Biden administration has a clear, indignant message: adopt our rules and provide gender-affirming care or students will die.

**The long-term effects of “gender-affirming care” advocated by HHS have been insufficiently evaluated**

Beyond the administration’s inexcusable hyperbole, reliable evidence actually indicates a higher rate of suicide among young people in jurisdictions that have increased access to “gender-affirming” care. A recent comprehensive study of the impact of such care found that “young people may also experience significant and irreversible harms from such medical interventions” and concluded that “[r]ather than facilitating access by minors to these medical interventions without parental consent, states should be pursuing policies that strengthen parental involvement in these important decisions with life-long implications for their children.”<sup>405</sup>

Relevant “medical treatments” such as puberty blockers and cross-sex hormones among adolescents “did not exist in the United States prior to 2007 and [were] extremely rare before 2010.”<sup>406</sup> Provision of these treatments in the U.S. is quite recent, and “[t]he effects of puberty blockers and cross-sex hormones as medical intervention for adolescents . . . has never been subjected to a large-scale randomized controlled trial (RCT), like the kind that it typically required for approval of new medications.”<sup>407</sup>

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<sup>402</sup> See <https://www.ed.gov/news/speeches/secretary-cardonas-remarks-us-department-education-releases-proposed-amendments-title-ix>.

<sup>403</sup> See <https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282&bc=ACAAAAAAQAAA&>.

<sup>404</sup> Ryan T. Anderson, *Sex Change: Physically Impossible, Psychosocially Unhelpful, and Philosophically Misguided*, PUB. DISCOURSE, Mar. 5, 2018, <https://www.thepublicdiscourse.com/2018/03/21151/>.

<sup>405</sup> Jay Greene, Ph.D., *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide*, HERITAGE FOUNDATION, Jun. 13, 2022, <https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide>.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*



Another recent analysis of a post-surgical transgender population study (published in the AMERICAN JOURNAL OF PSYCHIATRY in October 2019)<sup>408</sup> found that “transitioning” procedures failed to improve mental health struggles or to bring the other promised mental health benefits for patients suffering from gender dysphoria.<sup>409</sup> The study also found “no [mood or anxiety disorder] benefits to hormonal transition.”<sup>410</sup>

Nonetheless, the Biden administration’s medical, education, and political leadership insist these experimental treatments are requisite to saving lives, contrary to the public good with which they have been temporarily entrusted. The politicization of a person’s inner sense of gender may, indeed, have tremendous medical costs resulting from the continued promotion of “gender-affirming” care. As the Biden administration promotes what can only be described as experimental gender-affirming care, in July 2022 England’s National Institutes of Health (“NIH”) announced closure of its child gender identity clinic following an independent review determined that its care was “leaving young people ‘at considerable risk’ of poor mental health and distress.”<sup>411</sup>

The Cass Review,<sup>412</sup> led by former President of the Royal College of Paediatrics and Child Health, Dr. Hilary Cass,<sup>413</sup> noted that further examination of other mental health and cognitive issues in children should occur prior to treatment and that “. . . brain maturation may be temporarily or permanently disrupted by puberty blockers, which could have significant impact on the ability to make complex risk-laden decisions, as well as possible longer-term neuropsychological consequences.” The report noted the “lack of [medical] consensus and open discussion about the nature of gender dysphoria and therefore about the appropriate clinical response,” the need to “know more about the population being referred and outcomes,” and that routine and consistent data collection had not occurred, undermining the ability to track outcomes.<sup>414</sup>

One reporter recently noted:

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<sup>408</sup> See <https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.2019.19010080>.

<sup>409</sup> Ryan T. Anderson, “Transitioning” Procedures Don’t Help Mental Health, Largest Dataset Shows, DAILY SIGNAL, Aug. 3, 2020, [https://www.dailysignal.com/2020/08/03/transitioning-procedures-dont-help-mental-health-largest-dataset-shows/?\\_gl=1\\*1wt7dl8\\*\\_ga\\*MTY2OTI1NDM0NC4xNjYxODA4MjQw\\*\\_ga\\_W14BT6YQ87\\*MTY2MTgyMjEwOC4yLjAuMTY2MTgyMjEwOC42MC4wLjA](https://www.dailysignal.com/2020/08/03/transitioning-procedures-dont-help-mental-health-largest-dataset-shows/?_gl=1*1wt7dl8*_ga*MTY2OTI1NDM0NC4xNjYxODA4MjQw*_ga_W14BT6YQ87*MTY2MTgyMjEwOC4yLjAuMTY2MTgyMjEwOC42MC4wLjA).

<sup>410</sup> *Id.*

<sup>411</sup> Jasmine Andersson & Andre Rhoden-Paul, *NHS to Close Tavistock Child Gender Identity Clinic*, BBC NEWS, Jul. 28, 2022, <https://www.bbc.com/news/uk-62335665>.

<sup>412</sup> See <https://cass.independent-review.uk/publications/interim-report/>.

<sup>413</sup> See <https://cass.independent-review.uk/about-the-review/the-chair/>.

<sup>414</sup> *Id.*



As the Biden administration continues to try to use its regulatory powers to force a “gender-affirming” approach to children who question their sex, in other countries the rubber-stamping of a gender-dysphoric child’s belief and the prescribing of puberty-blocking drugs are under serious reconsideration. *The U.K., Sweden, Finland, and France—not exactly Bible Belt countries—are all pulling back from the rush to transition children.*<sup>415</sup>

### **Iran: a world leader in gender reassignment surgeries**

In fact, gender reassignment surgeries have historically been performed far more often in countries where homosexuality is illegal and may be punished with death.

Iran, for example, is an international hub for gender reassignment surgeries.<sup>416</sup> Iran’s late spiritual and political leader, Ayatollah Khomeini, issued a religious decree calling for gender reassignment surgeries “after being moved by a meeting with a woman who said she was trapped in a man’s body.”<sup>417</sup> According to a 2021 Country Report produced by the U.S. State Department, “NGOs reported that [government] authorities pressured LGBTQI+ persons to undergo gender reassignment surgery” and that these medical “procedures disregarded psychological and physical health . . .”<sup>418</sup> The State Department reported that “the number of private and semigovernmental psychological and psychiatric clinics allegedly engaging in ‘corrective treatment’ or reparative therapies of LGBTQI+ persons continue[s] to grow.”<sup>419</sup>

Homosexuality in Iran is a crime punishable by death, and gender reassignment surgeries are thus the preferred option—making Iran, where transsexuality was legalized in 1987, the second-leading provider in the world of such surgeries.<sup>420</sup> Differing from the gender reassignment procedures advocated by Admiral Levine (discussed *supra*), Iran also uses electric shock in addition to hormone treatments and “strong psychoactive medications,” according to a United Nations report

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<sup>415</sup> Wesley J. Smith, *U.K. Transgender Clinic to Close after Damning Report: “Not Safe” for Children*, NAT’L REV., Jul. 28, 2022, <https://www.nationalreview.com/corner/u-k-transgender-clinic-to-close-after-damning-report-not-safe-for-children/> (emphasis added).

<sup>416</sup> *Why Iran Is a Hub for Sex-reassignment Surgery: It Is Not Because the Regime Is Liberal*, ECONOMIST, Apr. 4, 2019, <https://www.economist.com/middle-east-and-africa/2019/04/04/why-iran-is-a-hub-for-sex-reassignment-surgery>.

<sup>417</sup> Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC NEWS, Nov. 5, 2014, <https://www.bbc.com/news/magazine-29832690>.

<sup>418</sup> See <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/iran>.

<sup>419</sup> See *id.*

<sup>420</sup> JERUSALEM POST Staff, *Homosexuals in Iran Are Having Sex Reassignment Surgery to Avoid Execution*, JERUSALEM POST, Mar. 6, 2020, <https://www.jpost.com/middle-east/iran-news/homosexuals-in-iran-having-sex-reassignment-surgery-to-avoid-execution-619968>.



on human rights violations in Iran.<sup>421</sup> According to reports from prominent Iranian-born LGTB activist Shadi Amin, “[t]he government believes that if you are a gay man your soul is that of a woman and you should change your body.”<sup>422</sup>

In the People’s Republic of China (“PRC”), gender-affirming treatments are also on the rise where, according to a report by the CCP-owned CHINA DAILY, gender reassignment doctors are “[h]elping women find their inner man” through surgeries,<sup>423</sup> and where, according to Amnesty International, gender incongruence is still treated as a mental health disorder under Chinese law.<sup>424</sup> The PRC permits corrective surgeries in order to treat what Chinese law considers a mental health disorder.

### **The Department must withdraw the NPRM in its entirety**

The NPRM ignores the proper safety, privacy, and dignity of female students. It does so despite Title IX’s clear purpose of guaranteeing equal educational opportunities for female students and in defiance of the Department’s own long-term guidance regarding the meaning of “sex” for Title IX purposes. With its promise of future rulemaking on the matter of sex-segregated sports, the Department claims to set aside for the moment an issue of considerable ongoing national debate; however, the regulatory text does not reflect the Department’s contention that the NPRM is not intended to impact women’s and girls’ athletics. The NPRM’s expansion of Title IX to gender identity includes no limiting language to preserve sex-segregated athletics; the proposed rule states quite clearly that failure of a recipient to respond to the demands imposed by a student’s gender identity (“inner sense of self”) will automatically constitute more than *de minimis* harm—thereby indicating a violation of Title IX. The NPRM does not shield sex-segregated sports from this element of the rule.

The NPRM violates the PPRA and FERPA through the monitoring and reporting requirements imposed on recipient employees by the NPRM. Those statutory requirements are simply ignored by the Department as it pursues its unprecedented reach into the sexual behavior or attitudes of students, religious practices, affiliations, or beliefs of the student or student’s parent, mental or psychological problems of the student or the student’s family, and the political affiliations or

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<sup>421</sup> Benjamin Weinthal, *Iran’s Use of “Electric Shocks” on Gay Children Is Torture, Says UN Report*, JERUSALEM POST, Feb. 12, 2021), <https://www.jpost.com/middle-east/iran-news/irans-use-of-electric-shocks-on-gay-children-is-torture-says-un-report-658727>.

<sup>422</sup> Mark Hodge, *Sexual “Cleansing” Iran Is Forcing Thousands of Gay People to Have Gender Reassignment Surgery Against Their Will or Face Execution*, SUN UK, Feb. 19, 2020, <https://www.thesun.co.uk/news/10998169/iran-gay-people-gender-reassignment-surgery/>.

<sup>423</sup> Xu Junqian, *Helping Women Find Their Inner Man*, CHINA DAILY, Mar. 24, 2017, [https://www.chinadaily.com.cn/china/2017-03/24/content\\_28660710.htm](https://www.chinadaily.com.cn/china/2017-03/24/content_28660710.htm).

<sup>424</sup> See <https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf>.